Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Service	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

REPLY COMMENTS OF CABLEVISION LIGHTPATH, INC. AND NEXTLINK COMMUNICATIONS, INC.

David Ellen, Esq.
Senior Counsel
Cablevision Lightpath, Inc.
1111 Stewart Avenue
Bethpage, NY 11714
(516) 803-2583

Daniel Gonzalez, Esq.
Director, Regulatory Affairs
Alaine Miller
Director, Regulatory and Public Policy
NEXTLINK Communications, Inc.
1730 Rhode Island Avenue, N.W.
Suite 1000
Washington, DC 20036
(202) 721-0999

Christopher J. Harvie
Tara M. Corvo
Uzoma C. Onyeije
Mintz, Levin, Cohn, Ferris, Glovsky
And Popeo, P.C.
701 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004-2608
(202) 434-7300

Counsel to Cablevision Lightpath, Inc. and
NEXTLINK Communications, Inc.

December 13, 1999

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks	)	WT Docket No. 99-217
in Local Telecommunications Markets	)	
	)	
Wireless Communications Association	)	
International, Inc. Petition for Rulemaking to	)	
Amend Section 1.4000 of the Commission's Rules	)	
to Preempt Restrictions on Subscriber Premises	)	
Reception or Transmission Antennas Designed	)	
to Provide Fixed Wireless Service	)	
	)	
Implementation of the Local Competition	)	
Provisions in the Telecommunications Act	)	CC Docket No. 96-98
of 1996	)	

REPLY COMMENTS OF
CABLEVISION LIGHTPATH, INC. AND NEXTLINK COMMUNICATIONS, INC.

Cablevision Lightpath, Inc. ("Lightpath")[1/] and NEXTLINK Communications, Inc. ("NEXTLINK")[2/] (together "Joint Commenters"), through their attorneys, hereby file these reply comments in response to the Commission's July 7, 1999 Notice of Inquiry in the above-captioned docket.[3/]

1/ Lightpath is a facilities-based competitive local exchange carrier that provides basic and advanced telecommunications services, including residential local exchange service in parts of New York and Connecticut. Lightpath has plans to further expand these services in other areas.

2/ NEXTLINK and its affiliates currently provide local, long distance and data services over local and national fiber optic and fixed wireless networks in 48 markets in 20 states across the United States.

3/ *In the Matter of Promotion at Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-17 (rel. July 7, 1999) ("*Notice*").

INTRODUCTION

The comments submitted in this proceeding reveal that competitive local exchange carriers ("CLECs") are unable to obtain fair, reasonable, competitively neutral and, most importantly, nondiscriminatory access to local public rights-of-way in several significant markets around the country. Indeed, the problem of discriminatory local telecommunications ordinances and fees may be more extensive than the Commission might have anticipated,[4/] particularly in light of the guidance provided in the *Troy* decision.[5/] The elimination of discriminatory entry barriers and burdens imposed by state and local governments was one of the primary components of the competitive blueprint established by Congress in the Telecommunications Act of 1996. In order to promote the widespread competitive entry envisioned by the 1996 Act, CLECs need the certainty of knowing that in any local market they enter, they will be not be subject to more costly fees and more burdensome regulatory requirements than the incumbent local exchange carriers ("ILECs"). As the Federal agency charged with effectuating the Congressional mandate for local competition, the FCC is ideally positioned and fully authorized to provide the certainty of non-discriminatory treatment that CLECs require.

The need for Commission action is underscored in comments submitted by local governments. Some localities aim to manage use of the public rights-of-way in a non-discriminatory manner, but nonetheless feel restricted by archaic state laws dating back to the 19th century, which ILECs claim exempt them from right-of-way regulations and fees imposed upon other providers. Other local governments wrongly believe that disparate treatment is permissible under Federal law and warranted by state law, ILEC build-out requirements and

---

4/ *Cf. Notice* at ¶ 72.

5/ *TCI Cablevision of Oakland County, Inc., Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, 12 FCC Rcd. 21396 (1997), *recon. denied*, 13 FCC Rcd. 16400 (1998) ("*Troy*").

universal service obligations. Regardless of whether archaic statewide franchise rights granted to the ILECs decades ago actually warrant the disparate imposition of fees and regulatory obligations (and the Joint Commenters believe they do not), it is clear that such disparate treatment is barred by Federal law. A clear statement from the Commission that CLECs must be offered access to the public rights-of-way on the same terms and conditions as ILECs would alleviate local governments' apparent difficulty or reluctance to impose fair and nondiscriminatory rights-of-way ordinances uniformly on all providers using the rights-of-way.

The comments submitted in this proceeding also demonstrate that many local governments continue to overstep the bounds of their authority under Section 253 by imposing franchising and fee requirements that bear no relationship to a locality's management of the public rights-of-way. Both the courts and the Commission have made clear that Section 253 precludes the imposition of local fees and regulations that are unrelated to a carrier's use of the public rights-of-way. To construe the 1996 Act as permitting local governments to impose plenary franchising and fee requirements on telecommunications carriers would mean that Congress intended to permit localities to impose a redundant "third tier" of regulation on such providers -- a result directly at odds with the language and purpose of Section 253. Notwithstanding local governments' arguments to the contrary, the Commission clearly has the authority and jurisdiction to implement and fulfill the Congressional directive to reduce burdens on new entry into local markets and ensure non-discriminatory treatment of competitors challenging the ILECs. While Cablevision and NEXTLINK focus in these reply comments on the need for swift Commission action to preclude the imposition of discriminatory fees and regulatory burdens on competitive providers, the Joint Commenters join with those parties

urging the Commission to make clear that costs and regulations unrelated to a carrier's use of the public rights-of-way are not permitted under Federal law.

ARGUMENT

I. THE EVIDENCE DEMONSTRATES THAT DISCRIMINATORY ORDINANCES ARE PREVALENT AND ARE STIFLING COMPETITION IN LOCAL MARKETS

The comments submitted by various local governments almost uniformly insist that "[t]here is no evidence to suggest local governments' current right-of-way or tax policies have impeded the entry of competitive providers into the market."[6/] This is untrue. The record is replete with examples of competitors' efforts to enter local markets being hindered or delayed by local governments' insistence that new entrants comply with burdensome terms and conditions of use of the rights-of-way to which the incumbent monopoly provider was not subject. For example:

- The Joint Commenters' initial comments describe the extreme difficulty faced by NEXTLINK in Maryland Heights, Missouri, where it was forced to institute litigation in order to gain access to the rights-of-way, and is now subject to a substantial, revenue-based local fee from which the incumbent provider, Southwestern Bell, is exempt.[7/]

- To compound the situation in Missouri, NEXTLINK has been subjected to disparate treatment in many municipalities in the St. Louis area, where it has been singled out and required to pay a fee that is approximately three and one-half times the amount paid by certain other new entrants for use of the rights-of-way.[8/]

[6/] Initial Comments of the National Association of Counties *et al.* ("NACO Comments") at i; *see also* Initial Comments of The North Suburban Communications Commission *et al.* ("North Suburban Comments") at 14 ("local right-of-way management is not, and never has been, a serious barrier to entry. Claims to the contrary made by the telecommunications industry are unsupported and illusory.").

[7/] Comments of Cablevision Lightpath, Inc. and NEXTLINK Communications, Inc. at 9-10. As noted in NEXTLINK's initial comments, Maryland Heights has agreed to waive that fee temporarily in order to settle a preliminary injunction motion, subject to retroactive payment for use of the rights-of-way in accordance with the results of the litigation. *Id.* at 9, n.19.

[8/] *Id.* at 11.

- The terms of a franchise proposed by the City of White Plains requires new entrants, such as Lightpath and NEXTLINK, to pay substantial revenue-based franchise fees (even in the event that a court declares the franchise fee illegal), to construct underground conduit for the City's use free of charge and at their own expense, and to waive the right to assert any claim that the terms of the agreement are invalid or unenforceable. The incumbent local exchange carrier, Bell Atlantic, is not subject to these obligations.[9/]

- The Association for Local Telecommunications Services ("ALTS") notes that "[i]n New York City, Bell Atlantic does not have a franchise agreement and does not pay any recurring fees to the city for the use of its rights-of-way."[10/] By contrast, CLECs in New York City must negotiate a franchise agreement with "a number of onerous terms and conditions" and "pay a recurring (yearly) franchise fee of 5% of gross annual revenues."[11/]

- Level 3 Communications' comments describe its experiences with various municipalities that have sought to impose substantial per linear foot charges as franchise fees, while its ILEC competitors are not subject to these fees.[12/]

- McLeod provided examples from five different states -- Iowa, Michigan, Colorado, Wisconsin and South Dakota -- in which municipalities sought to impose fees for use of the rights-of-way that were not imposed on the incumbent service provider, or otherwise imposed discriminatory burdens on competitive providers. As a result of each of these experiences, McLeod has been forced to redesign its network to avoid those cities, and thus deprive those city residents of a choice in facilities-based providers, or enter the local market at a competitive disadvantage to its primary competitor, the incumbent local exchange carrier.[13/]

- In one major U.S. city, Cox reports that it, as a new CLEC entrant, is subject to a 5% of all gross revenues right-of-way fee, while the ILEC must pay only a 3% fee on a smaller revenue base, and that CLECs must install six dark fibers for the City's free use, while the ILECs are not subject to any similar requirement.[14/]

9/ *Id.* at 12.

10/ Comments of ALTS at 11.

11/ *Id.*

12/ Comments of Level 3 Communications, LLC at 7, 9-10.

13/ McLeod USA Comments at 2-6.

14/ Comments of Cox Communications, Inc. at 11.

- ALTS provides additional examples of discriminatory fee and ordinance requirements imposed upon CLECs in New Orleans, Louisiana; Greensboro, North Carolina; and Salt Lake City, Utah.[15/]

- MediaOne notes that in a number of municipalities in Michigan, it is subject to fees and regulatory requirements from which the ILEC with whom it competes is exempt.[16/]

While many local governments attempt to dismiss these experiences as scattered or infrequent,[17/] it is clear that the problem of discriminatory ordinances is in fact growing. For example, the Joint Commenters noted in their initial comments a discriminatory right-of-way ordinance imposed upon NEXTLINK in King County, Washington.[18/] The ordinance subjects "wireline communications companies" to substantial fee and burdensome "third tier" regulatory requirements," but exempts US WEST and GTE from those fees and requirements. Since NEXTLINK submitted its initial comments, the King County government has proposed a new right-of-way ordinance, with burdens and requirements that are even more discriminatory than those already in place.[19/] The new ordinance requires all "Telecommunications Providers"[20/] to obtain a franchise and pay a fee for use of the rights-of-way, but specifically exempts "telephone or telegraph lines constructed and maintained by a telecommunications company that constructed

---

[15/] ALTS Comments at 12-14.

[16/] Comments of MediaOne at 6.

[17/] *See* Comments of the League of Minnesota Cities at 12 ("The League does not believe that states and local governments very often adopt unreasonable and anti-competitive regulations"); North Suburban Comments at 14 ("industry allegations [that local right-of-way management is a barrier to entry] are merely anecdotal and do not evidence a pattern of unreasonable right-of-way management and compensation practices.").

[18/] Lightpath/NEXTLINK Initial Comments at 14.

[19/] A copy of the proposed ordinance is attached hereto as Exhibit A.

[20/] "Telecommunications Provider" is defined as "every person that directly or indirectly owns, controls, operates or manages a telecommunication facility within the county right-of-way, used or to be used or planned to be used for the purpose of offering telecommunications." King County Proposed Ordinance, § 4(L).

or maintained telephone or telegraph lines along and upon any public road, street or highway in the State of Washington prior to March 28, 1890."[21/] Of course, this exemption applies only to the incumbent local exchange carriers, GTE and US WEST. Applicants requesting new franchises are also required to pay a five thousand dollar ($5000) franchise application fee, as well as "the full advertising costs associated with the application;" are required to provide extensive and burdensome financial and business information; and are required to obtain substantial insurance policies.[22/]

It takes only a few municipalities adopting the approach of King County to cause substantial competitive problems in the local telecommunications marketplace. As discussed by the Joint Commenters and Level 3 Communications in their initial comments,[23/] each discriminatory municipal ordinance often has a "ripple" or "whipsaw" effect on neighboring municipalities. Once a CLEC has committed to build facilities in a particular area, adjacent localities may gain significant bargaining leverage. Further, as described in the Joint Commenters' initial comments, many local ordinances contain "most favored nations" provisions that require CLECs to grant municipalities the option of invoking the terms of any other right-of-way agreement into which the CLEC enters.[24/] CLECs then may be faced with the choice of foregoing entry into specific localities in a geographic area or capitulating to discriminatory right-of-way requirements and fees.

[21/] *Id.*, § 3(A)(2).

[22/] *Id.*, §§ 9, 11.

[23/] *See* Lightpath/NEXTLINK Initial Comments at 8-9; Level 3 Communications Comments at 8.

[24/] Lightpath/NEXTLINK Initial Comments at 8.

Some local government groups wrongfully claim that discriminatory ordinances do not burden new entry into the local telecommunications marketplace.[25/] As evidence, they cite state laws that curtail local governments from imposing unreasonable or unfair burdens as a condition of use of the rights-of-way, and argue that despite these laws, competition for local telecommunications service has not increased. For example, the North Suburban Communications Commission argues that although Minnesota state law closely tracks FCC's interpretation of appropriate right-of-way management activities, the state statutory scheme has not resulted in more telecommunications competition.[26/] However, their "proof" of the lack of results from the statute consists of unsubstantiated reports that a few cities within the state of Minnesota have not received more than two or three requests for or inquiries concerning obtaining right-of-way permits.[27/] Further, the evidence even on this particular statute is contradictory, since the League of Minnesota Cities submits that "efforts in Minnesota to enact legislation and agency rules have fostered a healthy competitive telecommunications industry, while at the same time protecting important local government concerns."[28/] In addition, local governments in other states where legislation has been enacted to clarify the extent of appropriate right-of-way management clearly believe that such legislation "facilitates enhanced competition in local markets."[29/]

Other localities claim that the proliferation of competing telecommunications providers in municipalities around the country vitiates any claim that discriminatory or excessive local

---

[25/] *See, e.g.*, North Suburban Comments at 12-14.

[26/] *See id.* at 12-16.

[27/] *See id.* at 13-14.

[28/] League of Minnesota Cities Comments at 13.

[29/] Comments of the City of Chicago at 6 (noting that approximately 920 telecommunications providers have registered with the City pursuant to the Ordinance).

ordinances are burdening new entry.[30/] This argument is without merit. First, the record is replete with evidence that competitive providers, including the Joint Commenters themselves, have delayed or postponed the deployment of facilities in some localities -- such as White Plains, New York -- due to the burdens and fees associated with one-sided local telecommunications ordinances.[31/] Second, while Lightpath, NEXTLINK and other CLECs also have opted to enter some markets despite the existence of discriminatory ordinances, the mere fact of their entry does not cure the unlawful and adverse competitive impact associated with imposing fees and regulatory burdens only on new entrants. In enacting Section 253, "Congress directed [a] competitive neutrality requirement of § 253(c) to municipalities."[32/] This directive reflected a recognition that lasting and durable competition cannot occur where one provider enjoys a distinct cost or regulatory advantage over another carrier. The Congressional goal of eliminating barriers to competitive entry by new telecommunications providers would be wholly vitiated if localities retained *de facto* authority to administer local right-of-way management ordinances in a discriminatory or one-sided manner.

The delays associated with the costs and burdens imposed by discriminatory ordinances are in fact stifling the Commission's goal of facilities-based competition. As the FCC recently acknowledged in its remand order regarding unbundled network elements ("UNEs"), "a competitive LEC may choose not to enter a particular market because the costs and delays

---

[30/] Comments of the National League of Cities, *et al.* at 13-16.

[31/] *See, e.g.*, Lightpath/NEXTLINK Initial Comments at 12; Comments of MCI Worldcom, Inc. at 4; Cox Comments at 11-12. Further, this evidence does not even include instances where a CLEC designing its business plan may avoid certain localities known to insist on discriminatory right-of-way ordinances.

[32/] *AT&T Communications of the Southwest, Inc. v. Austin*, 1998 U.S. Dist. LEXIS 11508, *13 (W.D. Tex. 1998).

associated with deploying its own facilities would be too high."[33/] Indeed, one of the grounds for the Commission's decision to make interoffice transport an unbundled network element was its recognition of the burdens and delays on new entry imposed by some local governments:

> Several carriers argue that the process of securing necessary access to rights-of-way, pole attachments, and conduit space significantly delays their ability to compete. For example, NEXTLINK notes that it took two years to negotiate and obtain a telecommunications franchise from the City of New York before it could deploy competitive facilities, and that it must negotiate separate agreements with each municipality traversed by its fiber ring. We find that the delays of this magnitude associated with obtaining authority to access public rights-of-way materially delay the ability of a requesting carrier to self-provision transport.[34/]

While these costs and delays can be allayed on an interim basis via the availability of UNEs, the shortcomings of an entry strategy predicated upon heavy reliance on UNEs are well known (notwithstanding the Commission's vigorous and laudatory efforts), particularly for carriers that have adopted a facilities-based competitive strategy in order to avoid having the success of their business model depend upon the ILECs. Thus, the costs and delays associated with discriminatory ordinances can frustrate the emergence of the facilities-based competition sought by Congress and the Commission.

II. THE IMPOSITION OF DISCRIMINATORY OR ONE-SIDED RIGHT-OF-WAY REGULATORY OBLIGATIONS AND FEES IS UNLAWFUL UNDER FEDERAL LAW

The comments submitted by the local governments themselves in this proceeding confirm that some municipalities are imposing one-sided right-of-way ordinance and fee requirements resulting in discriminatory treatment of new entrants. Lightpath and NEXTLINK do not dispute the legitimate need for municipalities to exercise their authority to manage public rights-of-way,

---

[33/] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 Third Report and Order and Fourth Notice of Proposed Rulemaking*, CC Docket No. 96-98 (rel. Nov. 5, 1999) at ¶ 13.

[34/] *Id.* at ¶ 364.

but that authority must be exercised in a fair, reasonable, competitively neutral and non-discriminatory manner in order to comply with the 1996 Act.

Some local governments recognize that disparate treatment of new entrants into local telecommunications markets is inconsistent with the policies and purposes of the 1996 Act, but nonetheless believe themselves to be constrained by long-standing state laws that purport to exempt ILECs from local regulatory or fee requirements imposed on other providers.[35/] The National Association of Counties ("NACO"), along with numerous additional localities joining in its comments, agree that "[t]he Commission is rightly troubled by the notion of right-of-way arrangements that would 'favor incumbent LECs over competing carriers.'"[36/] NACO argues that the real problem stems "from the incumbent LECs that seek special treatment under federal, state or local law."[37/] NACO notes that many incumbents argue that antiquated nineteenth-century state laws grant them permanent access to the rights-of-way free-of-charge, and that they are otherwise exempt from local right-of-way ordinances:

> To the extent that state or federal laws or regulations favoring the incumbents exist, they are historical relics with no place in a modern competitive environment. At best, such rules are based on a century-old notion of a social compact with the Bell system that allowed a statutory monopoly in return for rate regulation and universal service. That compact no longer applies in today's market...[38/]

Lightpath and NEXTLINK agree that archaic state laws purporting to exempt ILECs from fees and obligations imposed on new entrants have no place in today's competitive marketplace. While Lightpath and NEXTLINK believe that such state laws are not as broad as the ILECs lead local governments to believe, it appears that many local governments are hesitant to challenge

---

35/ NACO Comments at 32-33.

36/ *Id.* at 32.

37/ *Id.*

38/ *Id.* at 33.

the ILECs' claims of exemption from local requirements imposed upon new entrants. As NACO puts it: "In every case where a local community addresses telecommunications use of the public rights-of-way, the single most difficult question is how to deal with the incumbent LEC -- the proverbial "900-pound gorilla" in the local telecommunications market."[39/]

The solution to this problem does not, however, lie in deciding to subject only CLECs to local fee and regulatory requirements. Instead, NACO's comments underscore the importance of articulating a clear Federal policy concerning the sea change established by the 1996 Act: one-sided and discriminatory local ordinances that favor incumbents are no longer permissible under Federal law.[40/] Clear direction from the Commission would facilitate the ability of those willing local communities to ensure that ILECs and CLECs are subject only to the type of non-discriminatory local regulatory regime envisioned under Federal law.

While NACO and the other localities joining its comments appear to be making laudable efforts to impose local fee and regulatory requirements on ILECs and CLECs alike, other local governments have filed comments that seek to justify the imposition of disparate treatment on

---

[39/] *See id.* at 32. *See also* Comments of the City of White Plains at 12 ("[i]t may well be appropriate for the City to revisit the obligations of Bell Atlantic to require it to pay compensation for their use of rights-of-way"); Comments of the Department of Information Technology and Telecommunications of the City of New York ("DoITT Comments") at 12 (same).

[40/] There are a small number of local governments (*see, e.g.*, Chicago Comments) that argue that the various state laws that have been enacted to prohibit discriminatory treatment of CLECs vis-a-vis the ILECs are sufficient to ensure local competition, and that action at the federal level is unwarranted and inappropriate. While such state efforts are commendable, the number of states with such laws is small. Further, there are also states, such as Arizona, that have laws affirmatively allowing for discrimination. *See* Lightpath/NEXTLINK Initial Comments at 14-15. Finally, even in those states with laws prohibiting discrimination, some localities oppose or refuse to adhere to the state statute's requirements. *See, e.g.*, Comments of the Colorado Municipal League *et al.* at 9-10 (discussing Denver's attempt to impose right-of-way ordinance under guise of police powers despite state law prohibiting such activities). Thus, the Joint Commenters believe that the existence of such statutes should not affect the conclusion that Commission action is needed.

incumbents and new entrants.[41/] While these localities correctly note that the 1996 Act does not require equal treatment of carriers that are not similarly situated,[42/] they fundamentally and fatally misconstrue what it means to be similarly situated in the context of Section 253. The City of Richmond argues that new entrants "are not similarly situated to traditional monopoly providers."[43/] This is not a permissible basis for distinguishing between carriers under Federal law, since the entire thrust of the 1996 Act was to eliminate "traditional monopoly providers" and substitute a fair and level playing field that allows for competition among multiple providers.[44/] Thus, as the Joint Commenters demonstrated in their initial comments, two carriers whose facilities place the same burden on the public rights-of-way are similarly situated and therefore may not be treated differently, regardless of whether their status is an incumbent or new entrant or if there are differences in their service offerings.[45/]

Certain municipalities argue that localities may exempt ILECs from fee requirements and regulatory burdens imposed upon CLECs because of (i) differences in service packages offered by providers; (ii) differences in emphasis between residential and commercial customers; or (iii) differences in universal service and build-out obligations.[46/] These putative justifications for disparate treatment between ILECs and CLECs have absolutely no legal merit, and are flatly contrary to the express Congressional directives set forth in the 1996 Act.

41/ *See, e.g.,* Comments of the City of Richmond at 9-11; White Plains Comments at 9-13; DoITT Comments at 9-14.

42/ *See, e.g.*, White Plains Comments at 12.

43/ Richmond Comments at 11.

44/ H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. (1996) ("Conference Report") at 1; *see also Silver Star Tel. Co., Inc., Petition for Preemption and Declaratory Ruling*, 1998 FCC LEXIS 4358, ¶ 10 (Aug. 24, 1998) (rejecting "the view that a state legal requirement is competitively neutral as long as it treats all new entrants equally, regardless of whether it favors incumbent LECs over new entrants").

45/ *See* Lightpath/NEXTLINK Initial Comments at 12-13.

First, the language of Section 253 precludes subjecting ILECs and CLECs to disparate treatment based upon differences in their service offerings or their mix of residential and business customers. Section 253 requires that municipalities afford competitively neutral and non-discriminatory treatment to all "telecommunications providers."[47/] Congress could have, for example, limited the non-discrimination requirement of Section 253 only to municipal regulation of local exchange carriers, or only to carriers serving both business and residential customers. [48/] Instead, Congress broadly applied its non-discriminatory directive to local regulation of all providers of telecommunications services. Local governments are therefore precluded from imposing regulatory distinctions based upon the type of telecommunications services provided, or customers served, by carriers.

Second, notwithstanding local government claims to the contrary, an ILEC's universal service obligations offer no basis for subjecting new entrants to one-sided local fee and regulatory regimes. As the Joint Commenters noted in their initial comments, [49/] if the ILECs received any reciprocal regulatory benefit in exchange for undertaking universal service obligations, it came in the form of decades of guaranteed rates of return and monopoly franchises, and not through a blanket exemption from local right-of-way regulation. Further, even if these localities are correct in their assertion that the Bell companies (and their progeny) were granted broad access to public rights-of-way in exchange for constructing a ubiquitous telecommunications network, that is no longer a material or permissible basis for continuing to

---

[46/] White Plains Comments at 10; DoITT Comments at 11; Richmond Comments at 10.

[47/] 47 U.S.C. § 253(c).

[48/] As other provisions of the 1996 Act demonstrate, Congress clearly knew how to legislate distinctions between telecommunications carriers and local exchange providers, *see* 47 U.S.C. § 251(a) - (b), or between business and residential customers. *See* 47 U.S.C. § 271 (c)(1)(A).

[49/] Lightpath/NEXTLINK Initial Comments at 21.

afford them special treatment under law. Indeed, it is this very legacy of government-granted monopoly privileges and special treatment that Congress sought to eliminate via the enactment of Section 253.

Third, the ILECs universal service obligations offer no justification for disparities in regulatory and fee requirements imposed by local governments. As the Joint Commenters showed in their Initial Comments, whatever right local governments may have had prior to the 1996 Act to take universal service into account when imposing local regulation on telecommunications carriers was eliminated when Congress passed the 1996 Act.[50/] The Act only reserves to States the authority to preserve and advance universal service, and clearly limits local government authority solely to management of the public rights-of-way.[51/] It does not authorize local governments to introduce unrelated factors, such as the provision of universal service, into their right-of-way regulatory schemes. Further, Congress already has determined how ILECs should be compensated for their universal service obligations in the new competitive environment established by the 1996 Act, and it is not the role of local governments to interfere with the regime established under Federal law or to effectuate the type of implicit subsidy

---

[50/] *Id.* at 22-23.

[51/] 47 U.S.C. § 253(b); *see BellSouth Telecommunications, Inc. v. Coral Springs*, 42 F.Supp.2d 1304, 1307 (S.D. Fla. 1999) ("In Section 253, Congress made a distinction between the authority of states in subsection (b) and local governments in subsection (c). While states may regulate universal service . . ., local governments can only manage the public rights-of-way"); *AT&T Communications of the Southwest, Inc. v. Dallas*, 8 F.Supp.2d 582, 591 (N.D. Tex. 1998) ("cities do not have the more general authority to regulate to . . . advance universal service . . . this is a function reserved to States by § 253(b), not to local governments"); *Troy* at ¶ 106 ("section 253(b)'s reservation to the States of authority over issues such as universal service . . . appears to reflect Congress' view that an array of local telecommunications regulations that vary from community to community is likely to discourage or delay the development of telecommunications competition").

scheme (via exemption from local regulation and fees) barred by Congress.[52/] Finally, there is nothing in the statute or its legislative history to suggest that Congress ever meant for ILECs to receive preferential franchise treatment at the local level in return for providing universal service. To the contrary, the entire thrust of Section 253 is to eliminate the ability of local governments to perpetuate such preferences and privileges.

Local governments offering universal service as a justification for disparate treatment are offering post-hoc rationales for their inability or unwillingness to subject ILECs to the same requirements as CLECs. Indeed, NACO and the local governments joining its comments recognize that grounding preferential local treatment of ILECs in universal service obligations is rooted in a "compact that no longer applies in today's market as that market is established by federal and state law, with universal service managed through multiple providers rather than a single monopolist ...."[53/] The Commission should make clear that the outdated and unwarranted justifications for disparate treatment articulated by some localities are impermissible under Federal law in order to provide clear and concrete policy guidance concerning local governments' obligations under Section 253 to regulate in a "competitively neutral" and "nondiscriminatory" manner.

[52/] 47 U.S.C. § 254; *Universal Service Report and Order* at ¶ 50 ("A principal purpose of section 254 is to create mechanisms that will sustain universal service as competition emerges"); H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. (1996) at 131 ("the conferees intend that any support mechanisms continued or created under new Section 254 should be explicit"). Moreover, the same principles of non-discrimination and competitive neutrality are embedded throughout Section 254. *See, e.g.*, 47 U.S.C. §§ 254(b)(4), 254(d), 254(f). Thus, efforts to advance the objectives of universal service in a discriminatory manner are inconsistent with Section 254 as well as Section 253.

[53/] NACO Comments at 33.

III. THE COMMISSION HAS THE POWER AND AUTHORITY TO ACT TO ENSURE THAT THE GOALS AND REQUIREMENTS OF THE 1996 ACT ARE FULLY CARRIED OUT AT THE LOCAL LEVEL

The comments submitted by CLECs in this proceeding regarding discriminatory and unreasonable local telecommunications ordinances and fee requirements underscore the need to "adopt a clearly articulated national policy regarding the scope of permissible local rights-of-way management activity."[54/] It is clear that the Federal policy of removing entry barriers, eliminating unnecessary regulation and assuring non-discrimination and competitive neutrality has not been embraced fully in many significant local markets around the country. RCN suggests that there is a need to "adopt a Policy Statement that can serve as a comprehensive interpretation by the Commission of the meaning, scope, and effect of § 253" and can be used to preclude "contrary or conflicting local rules, policies, or procedures."[55/]

Lightpath and NEXTLINK share the view that there is a compelling need -- particularly with respect to discriminatory local ordinances -- for the Commission to step into the breach by clarifying and amplifying the meaning and scope of Section 253, either through the adoption of formal rules or the issuance of a policy directive. With respect to effectuating the Congressional intent of competitive neutrality at the local level, Federal law compels local governments to either subject all telecommunications providers to local fees and regulatory requirements on a competitively neutral and non-discriminatory basis, or refrain from enacting such requirements. To that end, the Commission should affirm that the Congressional mandate against discriminatory treatment of new entrants means a local government cannot subject CLECs to fees and regulatory burdens that it is unwilling to impose on ILECs, regardless of any statewide

---

[54/] Comments of AT&T Corp at 7; *see also* Cox Comments at 12; Level 3 Communications Comments at 18-19.

[55/] RCN Comments at 8.

franchise rights held by the ILECs. The Commission should state unequivocally that Section 253 changes the pre-1996 legal and policy landscape with respect to local regulation of telecommunications providers, and the competitive neutrality requirement of Section 253 supersedes any pre-existing State or local laws that might otherwise have served as a justification for disparate treatment. Likewise, the Commission must make clear that a carrier's status as an ILEC or CLEC, its service offerings, or universal service and build-out obligations offer no foundation for disparate treatment under local right-of-way ordinances.

Notwithstanding local government arguments to the contrary, [56/] the Commission clearly has the authority to take such action. As the FCC already has acknowledged, discriminatory ordinances constitute barriers to entry, because they selectively impose cost and regulatory disparities on similarly situated entities using the public rights-of-way.[57/] The Congressional prohibition against state and local entry barriers precludes the enforcement of such local ordinances.[58/] As the administrative agency charged with implementing the requirements of the 1996 Act, the FCC has full authority to carry out Congress' intent to bar discriminatory local costs and regulations.[59/]

The Supreme Court recently held that the FCC has general jurisdiction to implement the 1996 Act's local competition provisions under its authority set forth in Section 201(b).[60/] The Court expressly found that "Section 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies."[61/] Thus, irrespective of the scope of the

---

[56/] City of Philadelphia Comments at 5; *see also* National League of Cities Comments at 4-6.

[57/] 47 U.S.C. § 253.

[58/] U.S. Constitution, Art. VI, § 2.

[59/] *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721, 730 (1999).

[60/] *AT&T v. Iowa Utils. Bd., supra.*

[61/] *Id.*

preemption provision in Section 253, Section 201 provides the Commission with the authority to issue a policy directive or adopt rules implementing the competitive neutrality and non-discrimination requirements of Section 253, as has been proposed by many commenters in this proceeding.[62/]

The arguments advanced by local governments in support of limiting the Commission's jurisdiction are either wholly without merit or inapposite to the issue of the Commission's authority to articulate a national policy statement regarding Section 253. Regardless of the FCC's explicit authority under Section 253,[63/] the FCC has authority under Section 201(b) of the Act to implement the Act's local competition provisions. Moreover, to hold that the Commission is without any authority to construe the degree to which a local ordinance satisfies the safe harbor requirements of Section 253(c) would effectively vitiate its authority to preempt local ordinances that violate subsection (a), since every local government could cloak local entry barriers in the garb of right-of-way management statutes.

The FCC clearly has the authority to implement and affirm that Section 253 supersedes pre-1996 Act State and local laws the conflict with, or thwart, accomplishment of the competitive neutrality and non-discriminatory requirements of the 1996 Act. In *City of New York v. FCC*,[64/] the Court held that pursuant to the Supremacy Clause, "when the Federal Government acts within the authority it possesses under the Constitution, it is empowered to pre-

---

[62/] *See, e.g.*, RCN Comments at 13-18.

[63/] Some local governments maintain that Section 253(c) altogether exempts the Commission from exercising any authority vis-à-vis local right-of-way ordinances. *See, e.g.*, Philadelphia Comments at 6; National League of Cities Comments at 5. Section 253(c) is not a blanket exemption for local governments from the requirements of Section 253(a). Instead, subsection (c), *inter alia*, provides localities with a safe harbor defense against a preemption challenge to a local ordinance under Section 253(a). *See, e.g.*, Initial Comments of RCN Telecom Services, Inc. at 13-14. But that defense -- and the attendant protection from Federal preemption -- is only available for local ordinances that are reasonable, competitively neutral and non-discriminatory.

empt state laws to the extent it is believed that such action is necessary to achieve its purposes"[65] Similarly, in *Capital Cities Cable, Inc. v. Crisp*,[66] the Supreme Court held that the FCC may preempt all conflicting state regulations when it determines that such preemption is necessary to ensure "a reasonable accommodation of conflicting policies that are within the agency's domain."[67] The argument for Commission jurisdiction in this instance is even stronger than in those cases, since Congress has expressly established that state and local laws that "prohibit or have the effect of prohibiting" new entry into local telecommunications markets are clearly subject to preemption by the FCC.[68] Through the adoption of Section 253(a), Congress has outlawed the imposition of discriminatory local ordinances, and the Commission is empowered -- through provisions in the 1996 Act, its authority in Section 201, and the Supremacy Clause -- to effectuate that intent.

Finally, Lightpath and NEXTLINK disagree with the suggestion by the League of Minnesota Cities and others that "[o]n those rare occasions when municipal regulations may go too far, judicial and administrative remedies are always available."[69] The judicial process moves extremely slowly, and cannot keep up with the needs of the fast-moving telecommunications market. For example, as discussed in its initial comments and above, NEXTLINK has been forced to litigate its right to fair, reasonable, competitively neutral and non-discriminatory terms of access to the rights-of-way vis-a-vis the ILEC in the City of Maryland Heights, Missouri. However, even though NEXTLINK filed its complaint nearly six months ago, the court in that

---

[64] 486 U.S. 57 (1988).

[65] *Id.* at 63.

[66] 467 U.S. 691 (1984).

[67] *Id.* at 700.

[68] 47 U.S.C. § 253(a).

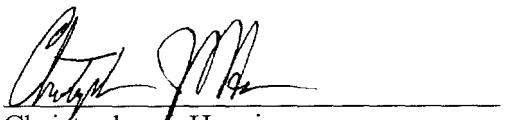
[69] League of Minnesota Cities Comments at 12.

case has not yet held a status conference, set a briefing schedule, or even ruled on the City's Motion to Dismiss filed in early August that alleges NEXTLINK lacks standing to bring the lawsuit. In a market where every day is a lost opportunity to capture new customers, reliance on the judicial system to resolve these types of disputes is unworkable.

CONCLUSION

For the above reasons, Lightpath and NEXTLINK urge the Commission to make clear that Federal law precludes local authorities from imposing disparate right-of-way obligations and fees on CLECs vis-a-vis ILECs.

Respectfully submitted,



Christopher J. Harvie
Tara M. Corvo
Uzoma C. Onyeije
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004-2608
(202) 434-7300

Counsel to Cablevision Lightpath, Inc. and
NEXTLINK Communications, Inc.

David Ellen, Esq.
Senior Counsel
Cablevision Lightpath, Inc.
1111 Stewart Avenue
Bethpage, NY 11714
(516) 803-2583

Daniel Gonzalez, Esq.
Director, Regulatory Affairs
Alaine Miller
Director, Regulatory and Public Policy
NEXTLINK Communications, Inc.
1730 Rhode Island Avenue, N.W.
Suite 1000
Washington, DC 20036
(202) 721-0999

December 13, 1999

DCDOCS:161788.3(3g%403!.DOC)

CERTIFICATE OF SERVICE

I, Margo B. Adams, hereby certify that on this 13th day of December 1999, I caused copies of the foregoing "Reply Comments of Cablevision Lightpath, Inc. and NEXTLINK Communications, Inc." to be sent via first class mail, postage prepaid to the following:

Kevin DiLallo
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, NW
Suite 900
Washington, D.C. 20036

Pamela J. Riley
AirTouch Communications, Inc.
1818 N. Street, N.W.
Suite 800
Washington, D.C. 20036

Lori S. Traweek
Vice President
Operations and Engineering
American Gas Association
400 N. Capitol Street, N.W.
Washington, D.C. 20001

Emily M. Williams
Association. for Local
Telecommunications Services
888 17th Street, N.W., Suite 900
Washington, D.C. 20006

Dorian S. Denburg
BellSouth Telecommunications, Inc.
Suite 4300
675 W. Peachtree Street
Atlanta, GA 30375

M. Robert Sutherland
BellSouth Corporation
1155 Peachtree Street, N.E. Suite 1700
Atlanta, GA 30306-3610

Michael F. Altschul
Vice President, General Counsel
Cellular Telecommunications Industry
Association
1250 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Mara S. Georges
Corporation Counsel of the City
Of Chicago
30 North LaSalle Street
Suite 900
Chicago, Illinois 60602

Christopher C. Torem
Assistant Corporation Counsel
30 North LaSalle Street
Suite 900
Chicago, Illinois 60602

Barbara S. Esbin
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036

Kenneth S. Fellman, Esq.
Kissinger & Fellman, P.C.
3773 Cherry Creek N. Drive
Suite 900
Denver, Colorado 80209

Geoffrey T. Wilson, Esq.
Colorado Municipal League
1144 Sherman Street
Denver, Colorado 80203

Debra Geibig, Esq.
Anderson, Dude & Lebel, P.C.
104 S. Cascade Avenue
Suite 204
Colorado Springs, CO 80903

Jean G. Howard, Esq.
Florida Power & Light Company
9250 West Flagler Street
Miami, Florida 33174

Joe D. Edge
Drinker Biddle & Reath LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005

Paul Kouroupas
Senior Counsel, World Wide Regulatory
& Industry Affairs
Global Crossing Development Co.
12 Headquarters Plaza
4th Floor North Tower
Morristown, NJ 07960

Theodore N. Gilliam
GST Telecom
4001 Main Street
Vancouver, WA 98663

John F. Raposa
GTE Service Corporation
600 Hidden Ridge
HQE03J27
Irving, Texas 75038

Cindy Z. Schonhaut
ICG Telecom Group, Inc.
161 Inverness Drive West
Englewood, CO 80112

Ron A. Adams, P.A.
Steel Hector & Davis LLP
200 S. Biscayne Blvd.
Suite 4000
Miami, Florida 33131

J. Jeffry Wahlen
Ausley & McMullen
P.O. Box 391
Tallahassee, FL 32302

Bert L. Waisanen
Federal Liaison Center
Government Finance Officers Association
1750 K Street, N.W., Suite 350
Washington, D.C. 20006

Martin L. Stern
Preston Gates Ellis & Rouvelas
Meeds LLP
1735 New York Avenue, N.W.
Suite 500
Washington, D.C. 20006

Daniel J. Perka
Swidler, Berlin, Shereff & Friedman
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007

Andre J. Lachance
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036

Thomas L. Grundhoefer
League of Minnesota Cities
145 University Avenue West
St. Paul, Minnesota 55103-2044

Patricia Paoletta
Level 3 Communications, LLC
1025 Eldorado Drive
Broomfield, CO 80021

Charles A. Rohe
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Suite 300
Washington, D.C. 20007-5116

Richard S. Lipman
McLeod USA Incorporated
6400 C Street, S.W.
P.O. Box 3177
Cedar Rapids, Iowa 52406-3177

Larry Fenster
MCI WorldCom, Inc.
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Susan M. Eid
MediaOne Group, Inc.
1919 Pennsylvania Avenue, NW
Suite 610
Washington, D.C. 20006

Henry M.Rivera
Shook, Hardy & Bacon, LLP
600 14th Street, N.W.
Washington, D.C. 20005-0004

Frederick E. Ellrod III
Miller & Van Eaton, PLLC
1155 Connecticut Avenue, NW
Suite 1000
Washington, D.C. 20036-4306

Daniel L. Brenner
National Cable Television Association
17724 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Tillman L. Lay
Miller, Canfield, Paddock & Stone, PLC
1900 K Street, N.W.
Suite 1150
Washington, D.C. 20006

Thomas D. Creighton
Bernick & Lifson, P.A.
5500 Wayzata Blvd.
Suite 1200
Minneaspolis, Minnesota 55416

Mary McDermott
Personal Communications Industry
Association
500 Montgomery Street, Suite 700
Alexandria, VA 22314-1561

Michael C. Athay
City of Philadelphia
One Parkway Building, 17th Floor
1515 Arch Street
Philadelphia, PA 19102

Bryan Jacobson
Pirelli Jacobson, Inc.
5355 28th Avenue, N.W.
Seattle, WA 98107

William L. Fishman
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116

Michael D. Hess, Esq.
Office of the Corporation Counsel of the City of New York
100 Church Street
New York, New York 10007

Elaine Reiss, Esq.
Dept. of Information Technology & Telecommunications of the City of New York
11 MetroTech Center
Brooklyn, New York 11201

Norman B. Sales, Esq.
City of Richmond
900 East Broad Street, Suite 300
Richmond, Virginia 23219

Alfred G. Richter, Jr.
SBC Communications Inc.
One Bell Plaza, Room 3023
Dallas, Texas 75202

Christie Newman Barrett
Assistant Attorney General
South Carolina Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

Jonathan M. Chambers
Vice President
Sprint PCS
1801 K Street, N.W., Suite M112
Washington, D.C. 20006

Jeffrey M. Pfaff
Sprint PCS
4900 Main, 11th Floor
Kansas City, MO 64112

Laurence E. Harris
Teligent, Inc.
8065 Leesburg Pike, Suite 400
Vienna, VA 22182

Philip L. Bverveer
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036

Micahel L. Katz
The Tilden Group, LLC
5335 College Avenue
Oakland, CA 94618

Caressa D. Bennet
Bennet & Bennet, PLLC
1000 Vermont Avenue, 10th Floor
Washington, D.C. 20005

Gary Kueltzo
United States Communications Association
30 S. Wacker Drive, 36th Floor
Chicago, IL 60606

Lawrence E. Sarjeant
United States Telephone Association
1401 H Street, N.W., Suite 600
Washington, D.C. 20005

Edward P. Dunphy, Esq.
Corporation Counsel of the City of White Plains
Municipal Building, 255 Main Street
White Plains, New York 10601

Margo B. Adams

DCDOCS:162380.1(3H@K01!.DOC)